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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-483

THOMAS F. O'CALLAGHAN, as President or CHARLES M. CROOKS, as Secretary-Treasurer, or WILLIAM M. CALDWELL, as Vice-President, of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Petitioners,

against

LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD, ARTHUR SOHNEN and JOHN HAYES, each of them individually and on behalf of all other members of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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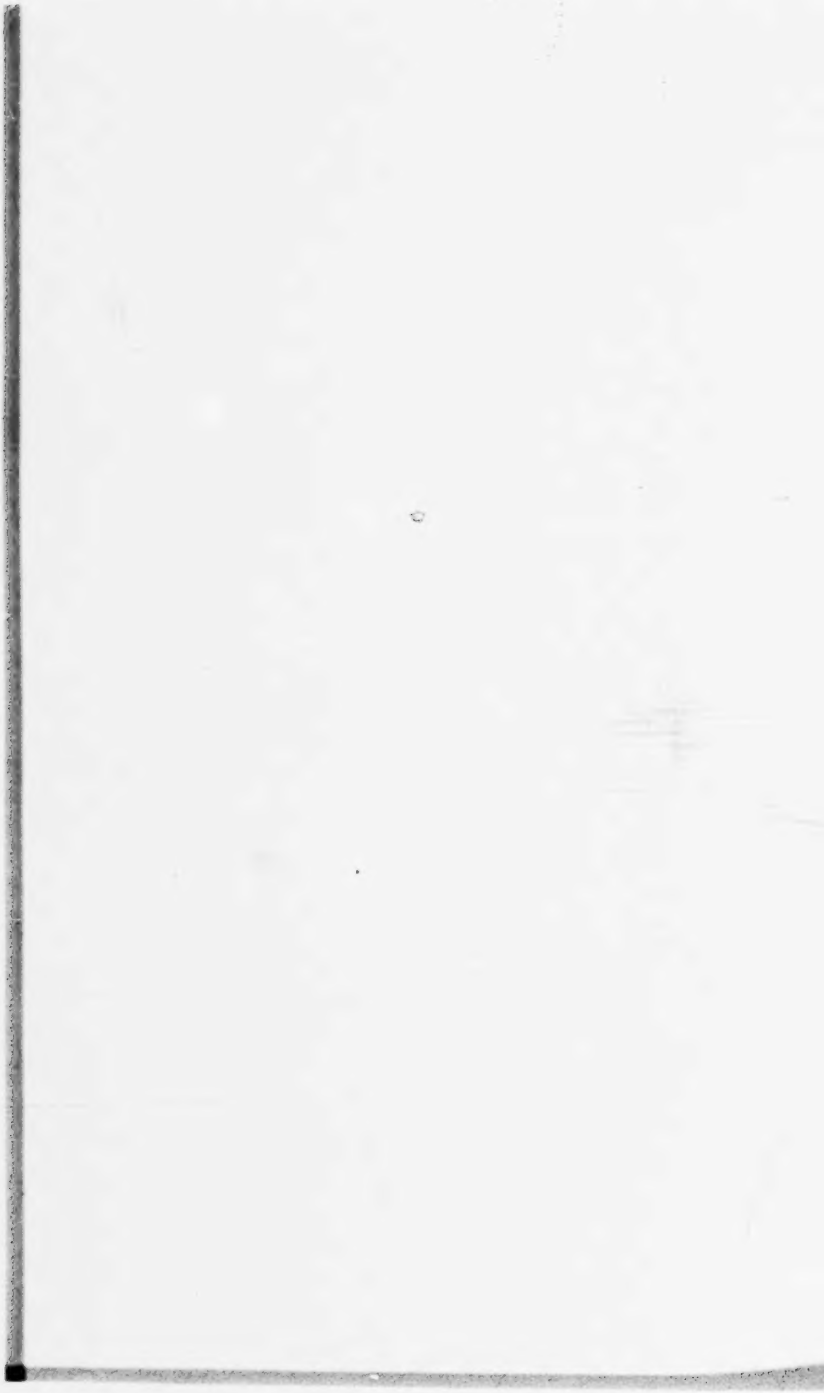

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The International Organization of Masters, Mates and Pilots, AFL-CIO ("IOMM&P") prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this case on May 28, 1974.

Opinions Below

The opinion of the Court of Appeals is reported at 497 F.2d 1276 (pp. 1-15a). The opinion of the District Court dismissing the complaint at the end of plaintiffs' case is unreported (pp. 17-27a).

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit was entered on May 28, 1974 (p. 1a). A petition for rehearing was denied on August 6, 1974 (pp. 29, 30a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Question Presented

Whether, in a non-election referendum conducted by a labor organization on proposed Constitutional amendments, Section 101 of the Labor Management Reporting and Disclosure Act of 1959 requires the union to make its membership lists available for the distribution of literature by individual members.

Statutes Involved

Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), (29 U.S.C. § 411) provides as follows:

> "Sec. 101. (a)(1) Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

Section 401(c) of the LMRDA (29 U.S.C. § 481(c)) provides that in union elections, a labor organization

> "shall be under a duty . . . to comply with all reasonable requests of any candidate to distribute

by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organization or its officers authorizes the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution."

Statement

This is an action challenging the validity of a referendum conducted by the defendant labor organization on a proposed new Constitution. The District Court dismissed the complaint at the end of plaintiff's case. The Court of Appeals reversed on the ground that the Union had violated the LMRDA by failing to make available the union's membership lists so that a group of members could disseminate literature opposing the proposed Constitution.

The referendum itself, which resulted in approval of the new Constitution, was conducted over a 90-day period between March and June, 1970. It has been in effect now for over four years. As a result of its adoption, the Union has been totally restructured, and reversal of the process would be a monumentally difficult undertaking.

The adoption of this Constitution culminated a lengthy series of steps in which the union membership was advised and involved to an extraordinary degree:

1. Prior to 1968 the IOMM&P consisted of a number of largely autonomous local unions, although its collective bargaining agreements were negotiated and ostensibly administered on an industry-wide basis. In response to a widespread demand to eliminate the local unions and consolidate their powers and responsibilities into divisions which corresponded to the bargaining patterns in the industry (*i.e.* Offshore, Inland, Governmental Employees, and Pilots), the then International President, plaintiff Lloyd Sheldon, appointed a Constitutional Advisory Committee.

2. The Constitutional Advisory Committee prepared proposals for the restructuring of the Union, including a proposal to consolidate the local unions into divisions. These proposals were published in full in the March, 1968 issue of the Union newspaper which is mailed to each member's home address, to the ships on which IOMM&P members are employed, to each local union, and to recreation centers overseas.

3. The proposals of the Constitutional Advisory Committee were put before the IOMM&P's regular International Convention held in May, 1968. The Convention, consisting of delegates elected by the membership, decided to hold an advisory referendum of the entire membership on the issue of restructuring the Union through consolidation of locals into divisions.

4. The advisory referendum approved the principle of restructuring and consolidation.

5. In response to the favorable advisory vote, the International Executive Board of the Union in December, 1968 voted to convene a special Constitutional Convention to be held in September, 1969. Both the result of the advisory referendum and the decision to convene a Constitutional Convention were reported in the January, 1969 issue of the Union's newspaper.

6. The Constitutional Convention met in September, 1969 and proposed certain constitutional amendments as well as a description of the Offshore Division, the Government Employees Division and the Inland Division. These proposals were published in full in the October, 1969 issue of the Union newspaper. The Convention then recessed to enable the locals and membership to consider these constitutional proposals more fully.

7. The Constitutional Convention reconvened on January 26, 1970 to consider a full draft of a proposed new Constitution. After making such changes in the draft as they deemed appropriate, the Convention delegates on January 31, 1970 approved the new Constitution by a heavy majority.

8. On February 23, 1970, the three International officers sent a letter to each one of the more than 11,000 IOMM&P members summarizing what were described as the "high points" of the proposed new Constitution and urging its adoption. The March 9, 1970 issue of the Union newspaper published the text of the proposed new Constitution in full. It also reprinted the February 23rd letter of the International officers. The District Court found that neither this letter nor any other union-sponsored communication misrepresented the nature or terms of the new Constitution and that the Union was not guilty of fraud in any of its literature relating to the referendum; the Court of Appeals did not disturb this finding.

9. The referendum itself took place between March and June, 1970. The ballot called for a "Yes" or "No" vote on the proposed new Constitution. Together with the ballot, the Union sent each member a printed booklet containing the text of the proposed new Constitution.

10. The new Constitution was approved by the membership by a vote of 2,781 for and 2,602 against.

During this entire sequence of events leading to the referendum and extending for approximately two years,

no member had requested the use of the union's mailing lists for dissemination of his views. The International Constitution contained no provisions allowing access to the membership lists; and never in its history had the Union made available its facilities for dissemination of members' views, except in elections for union office as required by federal law.

On the virtual eve of the referendum, a group of members, plaintiffs herein, sent a letter to the International demanding that the International's mailing lists be supplied to a mailing service so that they could disseminate to the membership their views in opposition to the new Constitution. Plaintiffs were not elected officials of either the International or of any of its local unions. They had, apparently, been selected at a meeting attended by a fraction of their local membership as a committee to oppose the adoption of the proposed new Constitution. Their local's own newspaper contained full expressions of opinion against the new Constitution and was widely distributed during the referendum period.

Faced with a last-minute demand by one group of rank-and-file members for direct or indirect access to the mailing lists, and with no procedures or tradition for making these available to all members who might seek the same privilege, the Union declined to comply with the demand. Had it acquiesced, the proximity to the referendum period was such that plaintiff's literature would have been received by the membership only after the referendum was under way; and other members who would suddenly become aware for the first time of this unprecedented right of access would not have been able to disseminate their own views until at least a portion of the ballots had already been returned. Thus plaintiff's access would have been more complete, extensive and effective than that of any competing group of rank-and-file members.

The District Court's Decision

The principal thrust of this action was directed not at the denial of membership lists but at other aspects of the referendum and balloting procedure. Plaintiffs attacked the submission of the new Constitution as a single document, the fairness of the vote-counting procedures, the accuracy of the union's own literature, and the denial to them of space in the Union's newspaper for dissemination of their views. The denial of access to union mailing lists was only cursorily mentioned.

The District Court, in dismissing the complaint at the end of plaintiffs' case, held that a new Constitution with a large number of new, interrelated provisions produced by a special Constitutional Convention, could reasonably be presented as a single document; that the explanatory literature issued by the Union was neither inaccurate nor misleading; that the balloting and vote-counting procedures, conducted by an independent nationally known organization, were fair and not fraudulent; and that neither the Union's Constitution nor federal law required the Union to make available its newspaper or mailing lists for the dissemination of views in opposition to the proposed new Constitution, the full text of which had twice been sent to the entire membership.[1]

On the issue of dissemination of opposing views, the District Court noted that when Congress wished to impose an obligation of equal opportunity to disseminate information, it knew how to do so, mentioning SEC legislation as one example. Section 101, the Court held, contains no such provision or requirement.

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[1] As the Court of Appeals opinion observes, "The union was composed of persons who were sufficiently well educated to serve as masters, mates and pilots, and who presumably could read and understand these documents." (p. 11a, footnote 7).

The Court of Appeals Decision

Plaintiffs did not raise on appeal their principal ground of attack at trial: the voting and ballot-counting procedures. The Court of Appeals rejected plaintiffs' challenges to the method of presenting the new Constitution as a single document, the accuracy of the Union's explanatory literature, and the denial of space in the union newspaper.

However, the Court of Appeals reversed the District Court on the ground that Section 101 of the LMRDA requires a union conducting a referendum among its membership to make available its membership lists, through a mailing service designated by it, so that members of the union may disseminate their views on the proposition to be voted upon. The Court's opinion cites no case authority or legislative history in support of its construction and neither refers to nor analyzes the statutory language itself. The Court apparently conceived of the LMRDA as a "code of fairness to assure democratic conduct of union affairs" and concluded that absent the right of access to membership lists, the referendum would not be "fair." The closest that the opinion come to statutory analysis is in the concluding footnote (p. 13a, footnote 9), in which the Court states that the Union officials' denial to plaintiffs of access to the mailing lists "rendered the referendum procedure so patently unfair that their conduct can fairly be deemed 'a denial of the [members'] equal right to vote in elections or referendums,' *Gurton* v. *Arons*, 339 F.2d at 374."

Reasons for Granting the Writ

I.

The decision below grossly misconstrues Section 101 of the LMRDA. It imparts into that Section a requirement which is nowhere contained within the fair meaning

of the statutory language and which is expressly negated by the clearest and most persuasive legislative history. Moreover, the very requirement which the Court below read into Section 101 is contained, and spelled out in precise terms, in another portion of the very same statute, applying to elections of union officers. Congress has thus manifested an express intent to grant access to membership lists to candidates in union elections. The absence of any such language in Section 101, dealing with non-election referendums, demonstrates the plainest intent that no such right was intended to be conferred. And the legislative history makes this evident beyond the slightest dispute.

What the Court below has done, therefore, is to read its own notions of "fairness" into the LMRDA, and in order to satisfy these notions, to impose a requirement nowhere contained in the statute and negated conclusively by both the statute itself, read as a whole, and the legislative history. Whether these notions are valid or not is irrelevant; what is at issue is the proper construction of a federal statute, not the formulation or moulding of a common law doctrine, which the Court below apparently conceived its task to be.[2]

Section 101 of the LMRDA sets forth a carefully defined and prescribed group of rights which union members are guaranteed and which labor organizations must honor. Included among these is the equal right to vote in union referendums, subject to reasonable rules and regulations. No member of defendant union was denied

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[2] The observation in the opinion below that the courts have an obligation to enforce "fairness" since "for more than a hundred years courts have been dealing with similar rights of members of unincorporated associations" manifests complete confusion between a court's role in deciding a common law claim and in construing a federal statute. The question of whether a common law right to membership lists exists was not raised in this case and was neither briefed, argued nor decided below.

the right to vote or coerced in its exercise. But nowhere does Section 101 purport to confer a right of access, direct or indirect, to membership lists for the purpose of disseminating views in a union referendum. And nowhere does that Section purport to transform the uniform, nondiscriminatory denial of such access into a denial of the "equal right to vote" in referendums.

In *Calhoon* v. *Harvey*, 379 U.S. 134, 139 (1964), this Court, after quoting Section 101(a)(1) of the LMRDA, characterized it as follows:

> "Plainly, this is no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote. And Congress carefully prescribed that even this right against distrimination is 'subject to reasonable rules and regulations' by the union. The complaining union members here have not been discriminated against in any way and have been denied no privilege or right to vote or nominate which the union has granted to others."

Even if Section 101 stood alone, it would be inadequate to confer the right which the Court below read into it. But it does not stand alone. Title IV of the very same statute deals extensively with union elections. And in that Title, the statute does, indeed, grant access to union membership lists for the dissemination of candidates' literature. Thus Section 401(c) of the LMRDA provides:

> "(c) Every national or international organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all

> reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organization or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution."

Section 401 deals exclusively with union elections, not referendums. And it embodies precisely the right and obligation which the Court below mistakenly read into Section 101. Plainly, when the Congress which enacted the LMRDA wished to provide access to membership lists for the dissemination of views, it knew how to do so in specific terms. To read such a requirement into Section 101, which contains not a hint of any such right, in light of the provisions of Title IV which expressly confer it but in other contexts only, is the most flagrant form of statutory misconstruction.[3]

The District Court herein accurately observed that in other statutes as well, Congress has shown its ability to

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[3] The Second Circuit itself, writing through different panels than the one herein, has recognized that the inclusion of specific and comprehensive rights and obligations in Title IV is persuasive evidence that the same rights and obligations should not be read into the simple provisions of Section 101. *Robins* v. *Rarback*, 325 F.2d 929 (2d Cir. 1963), *cert. den'd*, 379 U.S. 974; *Gurton* v. *Arons*, 339 F.2d 371 (2d Cir. 1964). In *Calhoon* v. *Harvey*, *supra*, this Court reversed the Second Circuit (324 F.2d 486); the author of the Second Circuit opinion in *Calhoon* was a member of the panel below.

impose in clear language the obligation of equal opportunity to disseminate information when it wished to do so. *E.g.* Securities Exchange Act of 1934, 15 U.S.C. § 78n and Rule 14a (17 C.F.R. 240, 14a of the General Rules and Regulations under the Securities Exchange Act of 1934); Federal Communications Act, 47 U.S.C. § 315. But it is not necessary to go beyond the confines of the LMRDA itself for convincing demonstration of this point.

Nor is it necessary to speculate as to why Congress chose to distinguish between referendums and elections, although ample reasons suggest themselves. The process by which electoral control is achieved over the organization itself may well be regarded as of preeminent importance, justifying special treatment. Moreover, in the case of elections, there are a limited number of candidates who have been duly nominated and qualified as such. They alone have the rights which Title IV confers upon candidates. Congress may well have perceived that to confer the same right upon each and every union member in non-election referendums would impose an intolerable burden upon the union and an intolerable supervisory task upon the judiciary. In this regard, it is worthy of note that when Congress has chosen to impose a duty to assure equal opportunity to disseminate opposing views, it has done so when there is an administrative agency, charged generally with regulating the type of activity involved, which can bring its expertise and procedures to bear. In the case of Title IV of the LMRDA, this role is filled by the Department of Labor. In other statutes, it is the Securities and Exchange Commission or the Federal Communications Commission. But no agency or department administers Section 101 of the LMRDA. Section 101 rights are enforced directly by the Courts through ordinary judicial proceedings under Section 102. This is yet another reason for the limitation on the incursion which Section 101 permits on union control of the union's own internal affairs.

II.

The decision below wholly ignores the legislative history of Section 101 of the LMRDA. That history makes abundantly clear that Congress expressly considered and rejected the inclusion of a right of access to membership lists when it adopted Title I of the LMRDA, the so-called "bill of rights" in which Section 101 is contained.

The LMRDA was the product of a series of bills which culminated in the ultimate statute. In at least three of these bills, the union members' "bill of rights" which was the source of Section 101 contained an express right of access to membership lists for dissemination of views. These provisions were all deleted in the final bill. Moreover, the absence of any right of access to membership lists under Title I was expressly noted in the legislative debates. The effect of the decision below, therefore, is to read into Title I a requirement that Congress had before it and deliberately deleted. Specifically:

(1) The first and principal bill introduced in the House was H.R. 4473, introduced by Representative Barden, Chairman of the House Committee on Education and Welfare, the House Committee in charge of these measures. His bill was also the first to contain a so-called Bill of Rights for union members. Section 101(a)(2) of that bill provided as follows (Legislative History of the Labor Management Reporting and Disclosure Act of 1959, published by National Labor Relations Board, Vol. I, p. 175) (hereafter "Legis. Hist."):

> "(2) Freedom of Speech. Every member of a labor organization shall have the right to speak freely on matters affecting such organization, including the right to criticize union officers, agents, and representatives and union practices and policies. Labor organizations shall guarantee to each member the right to express any views, arguments, or opinions and to disseminate the same, either orally

or in printed, graphic, or visual form. In order to assist him in the exercise of such right, each member shall have the right to inspect a list containing the names and last known addresses of all members of the labor organization, which list shall be maintained and kept at the principal place of business of such labor organization by a designated official thereof."

(2) H.R. 7265, subsequently introduced by Representative Kearns, also contained a Bill of Rights. The provisions dealing with the same subject as Section 101(a) of the final Act, read (Legis. Hist., Vol. 1, pp. 601-603):

"(2) FREEDOM OF SPEECH AND ASSEMBLY.—Every member of a labor organization shall have the right to speak freely on matters affecting such organization, including the right to criticize union officers, agents, and representatives and union practices and policies, to express any views, arguments, or opinions and to disseminate the same, either orally or in printed, graphic, or visual form, to meet and assemble freely with other members, in large or small groups, for the purpose of discussing any matter or matters directly or indirectly affecting the union or of advocating changes in rules, practices, procedures, and policies of such labor organizations, to campaign for a change in officers, agents, or representatives, and to campaign for or against any candidate for union office: *Provided*, That nothing in this paragraph shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations. In order to assist him in the exercise of such rights, each member shall have the right to inspect a list containing the names and last known

addresses of all members of the labor organization, which list shall be maintained and kept at the principal place of business of such labor organization by a designated official thereof: *Provided*, That such list need not be disclosed where the designated official has reasonable cause to believe that it will be used to interfere with employees in their exercise of the rights guaranteed in section 7."

(3) Senator McClellan, chairman of the select investigatory committee whose public hearings led to this legislation, introduced his own bill, S. 1137, which also contained a Bill of Rights for union members. Section 101 dealing with "Basic Rights" included the following (Legis. Hist., Vol. I, p. 268):

> "(3) FREEDOM OF SPEECH.—Every member of a labor organization shall have the right to express any views, arguments, or opinions regarding any matter respecting such organization or its officers, agents, or representatives, and to disseminate such views, arguments, or opinions either orally or in printed, graphic, or visual form, without being subject to penalty, discipline, or interference of any kind by such organization.
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> • • •
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> "(8) INSPECTION OF MEMBERSHIP LISTS.—Each member of a labor organization or his agent shall have the right to inspect a list of the names and last known addresses of all members of such organization. Such list shall be maintained at the principal place of business of such organization by a designated official thereof."

Apart from the express conferral of a right of access to membership lists, the right to "disseminate such views . . . in printed form" contained in paragraph (3) of the McClellan bill would also have given some support to the ruling below.

(4) The present Title I was not contained in the bill reported out by the Senate Committee. A Bill of Rights was offered as an amendment on the floor by Senator McClellan and was adopted by a margin of one vote. Legis. Hist., Vol. II, pp. 1102, 1119. The Bill of Rights adopted on that occasion varied considerably from present Title I. The Section dealing with freedom of speech was similar to that in Senator McClellan's bill, S. 1137, quoted above, and included a right to "disseminate such views . . . in printed form." The provision on access to membership lists, however, was no longer a general right of union members, but was restricted to candidates for elective office. Legis. Hist., Vol. II, p. 1102. Two days later, a group of Senators introduced a substantially amended version of the Bill of Rights which was designed to eliminate problems foreseen with Senator McClellan's proposal. This substitute version was adopted by a heavy margin. Among other things, it eliminated the provision entitling members to "disseminate such views . . . in printed form," as well as the entire paragraph on candidates' access to membership lists (which was to be treated in the separate Title dealing with elections). Legis. Hist., Vol. II, pp. 1220-1221, 1239. This is the version of Title I that survived virtually intact in the final statute.

(5) Senator Goldwater, one of the most active Senators on this entire legislation, testified on June 8, 1959 before the House Committee on Education and Labor, on the bill which passed the Senate and which, in so far as relevant here, was the bill ultimately adopted. He sharply criticized Title I as inadequate, stating (Legis. Hist., Vol. II, p. 1280):

> "This is not a general grant of rights protecting a union member in every aspect of the union's activities. It is an enumeration of specific rights and all those not mentioned are obviously not protected. For example, *there is no protection of a member's right* to be a candidate for or to hold union office, *to see the membership lists of the union*, or to have

> access to the basic books, records, and accounts of the union. Moreover, the few enumerated rights which are granted are limited by the rules, regulations, or restrictions imposed by the union upon their exercise." (Emphasis supplied.)

Senator Goldwater made his Committee testimony a part of the Congressional Record. *Ibid.*

The fact that some of these rejected Congressional proposals contemplated a direct access to membership lists while the decision below is cast in terms of indirect access, through an independent mailing agency, is irrelevant. Under the original proposals on union elections, a direct access to membership lists was provided. See *e.g.* Legis. Hist., Vol. II, p. 1102; Senator McClellan's proposal would have entitled candidates for election to "reproduce" as well as inspect membership lists. When the problems with this approach were perceived, the indirect access was substituted. Faced with the same type of original treatment in the non-election Bill of Rights proposals, Congress chose to eliminate the requirement entirely.

III.

This case involves a question of exceptional importance in the administration of the internal affairs of labor organizations and a novel issue of construction of the principal federal statute dealing with these matters.[4] Large numbers

[4] From the standpoint of petitioner, the invalidation of its 1970 referendum would have the most far-reaching and disruptive consequences. To return to the old Constitution would require a restructuring of the entire Union. The locals that formerly existed have been abolished; their assets have been transferred to the basic industrials Divisions and used for the purposes of the Divisions for over 3 years; and the former local members have become members of the new Divisions. All elections since 1970 have been conducted under new structure, as have all other union affairs. Undoing what has existed for four years would be a step of monumental proportions.

of labor organizations make important decisions through membership referendums, and to the best of our knowledge, do not make membership lists available in connection therewith. No previous case has held that the LMRDA compels them to do so. The only case to consider the question previously reached precisely the opposite conclusion as the Court below and rejected any federal claim of access to membership lists in a non-election referendum. *Allen* v. *Bridge, Structural & Ornamental Iron Workers, Local 92,* 41 CCH Lab. Cases ¶ 16,697 (D. Ala. 1960).

Moreover, the decision below contains highly significant and dangerous implications in its emphasis on the right—nay, duty—of the federal judiciary to insure "fairness" in the conduct of internal union affairs. The Landrum-Griffin Act, like most labor legislation, was a compromise product of strongly felt views on a sensitive, highly charged subject. Among the fears expressed by many legislators and witnesses was the danger of excessive judicial interference in union affairs. Lurking in the background was the spectre of the historic abuse of the injunction weapon by federal courts in labor matters. In enacting the LMRDA, Congress carefully struck a balance; it granted certain rights and imposed certain obligations, but refrained from including other measures sought by proponents of more restrictive legislation. The decision below goes a long way toward drawing the line at a point quite different from that selected by Congress. Its rationale, moreover, would extend to other incursions which are not justified by either statutory language or legislative history.

The decision below has already been cited as supporting not only a right of access to lists in union referendums, but the submission of the proposed ballot and explanatory literature to a federal court for its advance approval, on the ground that an admittedly accurate statement prepared by the union did not fully explain all possible implications and consequences of the referendum proposition. *Norman Blanchard, et al.* v. *Rolla R. Johnson,* Index No. C-74-546,

(United States District Court, Northern District of Ohio, Eastern Division), 74 CCH Lab. Cases ¶ 10182. All this is justified in the name of "fairness" and under the imprimatur of Section 101(a)(1). The result is to place the federal judiciary squarely in the midst of a host of administrative decisions in the governance of labor union affairs, despite the absence of fraud, discriminatory treatment or denial of the specific basic rights referred to in the statute. Questions as to the adequacy or timeliness of production of membership lists or the terms of union explanatory literature, for example, would fall within the judicial province since there is no administrative agency empowered under the Act to consider them.

The Court should make emphatically clear, as it perhaps thought it did in *Calhoon* v. *Harvey*, that Section 101 means what it says and that it was never intended as a roving warrant to federal courts to regulate union referendums or other union affairs, except as the statute specifically authorizes. Certiorari should be granted and the decision below reversed.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Cal. No. 841—September Term, 1973.

Docket No. 73-1744

(Argued April 11, 1974 Decided May 28, 1974.)

LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD, ARTHUR SOHNEN and JOHN HAYES, each of them individually and on behalf of all other members of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, similarly situated,

Plaintiffs-Appellants,

v.

THOMAS F. O'CALLAGHAN, as President, or CHARLES M. CROOKS, as Secretary-Treasurer, or WILLIAM M. CALDWELL, as Vice President, of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendant-Appellee.

—o—

Before:

FRIENDLY and TIMBERS, *Circuit Judges*,
and THOMSEN, *District Judge.**

Plaintiffs-Appellants, members of the International Organization of Masters, Mates and Pilots, AFL-CIO,

* Of the District of Maryland, sitting by designation.

brought this action in the Southern District of New York against the three International officers of the union for an injunction preventing a new union constitution from becoming effective. They appeal from an adverse judgment entered by Judge Knapp at the close of plaintiffs' case.

Reversed and Remanded.

BURTON H. HALL, New York, New York, *for plaintiffs-appellants.*

MARVIN SCHWARTZ, New York, New York, *for defendant-appellee.*

THOMSEN, *District Judge*:

Plaintiffs, members of the International Organization of Masters, Mates and Pilots, AFL-CIO (the union), brought this action in the district court against the three International officers of the union for an injunction preventing a new union constitution from becoming effective. They appeal from an adverse judgment entered at the close of plaintiffs' case.

Plaintiff's argued below and argue here that defendants, as officers of the union, infringed the rights of plaintiffs and other members of the union under § 101 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411, and under the old constitution of the union, (1) by not permitting separate votes on the various provisions of the new constitution, which included an increase in dues and an enlargement of the powers of the defendant officers, but requiring a single "yes" or "no" vote on the adoption of the new constitution; and (2) by publishing allegedly misleading information about the new constitution and refusing to permit plaintiffs either (a) to state their objections to the new constitution in the union newspaper, or (b) to have access to the union's mailing list or

to have the list made available to a mailing service selected by defendants, so that plaintiffs could transmit their views to the other members of the union before or during the voting period.

The stipulated facts and other evidence show that before 1968 the union consisted of largely autonomous local unions, although its collective bargaining agreements were negotiated on an industry-wide basis. In response to suggestions to eliminate the local unions and consolidate their powers and responsibilities into divisions which corresponded to the bargaining patterns in the industry (i.e., offshore, inland, governmental employees and pilots), plaintiff Sheldon, who was then International President, appointed a Constitutional Advisory Committee.[1] That committee prepared proposals for restructuring the union, including a proposal to consolidate the local unions into divisions. Those proposals were published in the March 1968 issue of the union newspaper, which is mailed to each member's home address, to the ships on which members are employed, to each local union, and to recreation centers overseas.

The committee's proposals were put before the International convention held in May 1968. The convention decided to hold an advisory referendum of the entire membership on the issue of restructuring the union through consolidation of locals into divisions. The advisory referendum approved the principle of restructuring and consolidation by a vote of about five to two.

In December 1968 the International Executive Board voted to convene a special constitutional convention to be held in September 1969. The result of the advisory referendum and the decision to convene a constitutional convention were reported in the January 1969 issue of the union newspaper. The constitutional convention met in Septem-

[1] Sheldon was thereafter defeated in his bid for reelection by the current President, defendant Thomas F. O'Callaghan.

ber 1969. It proposed certain constitutional amendments and a description of a proposed structure for an Offshore Division and other divisions. These proposals were published in the October 1969 issue of the union newspaper.

The convention on January 26, 1970, to consider a draft of a proposed new constitution, which contained a variety of amendments to the then-existing constitution. It "consolidated" all local unions of the sea-going members, who comprise some 8,000 of the union's total membership of 10,000, into a nation-wide Offshore Division, and created other nation-wide divisions for non-seagoing members. It changed the union's dues structure in various ways and increased the rates of dues payable by more than half of the union's members. It raised the salaries of the two top International officers, and provided for a new, $35,000 salary for a third, previously unsalaried International officer. It greatly increased the power of the three International officers by providing that those three officers were to become the three top officers of each division, including the Offshore Division, and by virtue of being the three top officers of the Offshore Division would be able to cast one-half of the weighted vote of the Offshore Division on the General Executive Board of the union.

The pre-existing constitution provided that it might be amended by a two-step procedure: approval at a convention and, thereafter, approval by the membership in a referendum.

At the session of the constitutional convention on January 31, 1970, a delegate raised a point of information as to whether the separate provisions of the "new" constitution would be voted upon seriatim or separately; the Chairman (defendant O'Callaghan, the International President) ruled that the entire document would be voted upon as a single package. The proposed constitution was put to a vote at the convention and was approved by a more than two-thirds vote.

Opinion of United States Court of Appeals for the Second Circuit

During the convention, the International President announced that a committee composed of the executive officers (or their designees) of each offshore local would meet after the close of the convention for the preparation of Offshore Division by-laws. After the convention had dissolved, that committee met and drafted a set of by-laws for the Offshore Division.

During February 1970 a copy of the proposed constitution was sent to the executive officer of each local union and a mimeographed copy of the proposed Offshore Division by-laws was sent to the executive officer of each offshore local. The referendum was to be conducted by mail, over a three month period beginning in March 1970 and ending in June 1970. All members were to vote on the adoption of the proposed constitution; all offshore members were to vote on the adoption of the proposed Offshore Division by-laws.

One of the provisions of the proposed constitution was widely publicized by defendants before and during the referendum; that was the provision which would consolidate all sea-going local unions into one division—a popular proposal.

On February 23, 1970, the three International officers sent a letter to each member of the union summarizing what they described as the "high points" of the proposed constitution and urging its adoption.[2] The March 9, 1970

[2] The letter referred not only to the consolidation of local unions, but to at least seventeen other provisions in the new constitution. These included such matters as "Closing of membership rolls until a reasonable membership/job relationship exists", liberalization of qualification for elective office, annual conventions, reduction in terms of elective office, disciplinary procedural changes, recall of officers, and obtaining a national pension and welfare plan. On the question of a dues increase, the letter stated: "The dues for the Offshore Division calls for an increase. Inland dues remain the same. For the past several years the initiation fees have paid over thirty-five

issue of the union newspaper published the text of the proposed new constitution in full, and reprinted the February 23 letter of the International officers.

Shortly after receiving the February 23 letter plaintiffs, individually and as members of a committee elected by Local 88 to oppose the new constitution, asked for an opportunity to express their views to the membership of the union, either by space in the union newspaper, by use of the union's mailing list, or through an independent mailing service designated by the International office, at the cost of the plaintiffs. Their requests were ignored or denied. On the other hand, defendants repeatedly published material favoring the new constitution. In addition to reprinting the February 23 letter on the back page of the March 1970 issue of the union newspaper, the International officers published, in the two issues of the paper which appeared during the referendum period, a substantial amount of material advocating approval.

A ballot containing spaces for a "yes" or "no" vote on the proposed new constitution was sent to each member of the union, together with a booklet containing the text of the proposed constitution. Each offshore member also received a second booklet, containing the text of the proposed Offshore Division by-laws, on which their ballots called for "yes" or "no" votes.

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percent of the International expenses. Income from initiations will cease until the membership/job ratio is realized. The necessity of a dues increase is obvious."

Neither the letter of February 23 nor any other letter to the membership nor any issue of the union newspaper contained any discussion of the proposal to make the three International officers automatically the three top officers of all divisions, or of the proposal to give the three International officers half the weighted vote on the General Executive Board of the Offshore Division. Nor did the union, or any of its officers, publish any statement or article by any opponent of the proposed constitution.

The ballots were counted in June 1970. The new constitution was approved by a vote of 2,781 for and 2,602 against; the Offshore Division by-laws were approved by a vote of 2,206 for and 2,113 against. The new constitution and Offshore Division by-laws went into effect after plaintiffs filed this action.

(1) Plaintiffs' first argument is that the defendants infringed their rights and the rights of other members of the union under § 101 (a) (1) and (3) of the LMRDA, 29 U.S.C. 411 (a) (1) and (3),[3] and under the old constitution, by not permitting separate votes on the various provisions of the new constitution; particularly, they object to not

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[3] 101 (a) (1) provides: "*Equal rights.*—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

§ 101 (a) (3) provides that dues shall not be increased except:

"* * *

"(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organization, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

having been able to vote on the dues increase and the enlarged powers of the International officers separately from the consolidation of the local unions, which plaintiffs and most union members favored.

Plaintiffs rely on *Sertic* v. *Cuyahoga, Lake, Geauga & Ashtabula Cos., C.D.C.*, 423 F.2d 515 (6 Cir. 1970), where the court held that a referendum that resulted in an increase in dues, in which the ballot gave a member no opportunity to vote against such increase without also voting against negotiations for a wage increase, was a violation of the LMRDA. The Sixth Circuit stated that free participation in union government "necessarily would include the right to vote 'yes' or 'no' on increases of dues or assessments without coercion. * * * Union members are entitled under the Act to the right of a meaningful vote on increases in dues or assessments". (p. 521). We do not disagree with the principles stated in *Sertic*, but we conclude that those principles did not require the union in the instant case to submit for a separate vote each of the many interrelated provisions of the proposed new constitution. The adoption of some of those provisions and the rejection of others might have resulted in an unworkable document, and thrown the operation of the union into confusion.[4]

Nor is there any merit in plaintiffs' contention that the old constitution required a separate vote on the various provisions of the proposed new constitution which differed from the provisions of the old.

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[4] The district court found: "The Union, and particularly the Convention delegates responsible for drafting the new Constitution to be submitted to the membership, could reasonably have concluded that the dues increase for offshore members was related to the restructuring and consolidation of the Union provided for in the new Constitution, including the limitation on new members."

(2) Plaintiffs also argue that defendants deprived them of their rights under § 101 (a) (1) of LMRDA, 29 U.S.C. 411 (a) (1), and under the old constitution of the union, by publishing misleading information about the new constitution and refusing plaintiffs' repeated requests for permission either to state their objections to the new constitution in the union newspaper, or to have access to the union's mailing list, or to have the list made available to a mailing service selected by defendants, so that plaintiffs could transmit their views to the other members of the union before or during the voting period.

The purpose of the LMRDA was stated by Chief Judge Lumbard in *Navarro* v. *Gannon*, 385 F.2d 512, 518 (2 Cir. 1967), as follows:

> "The LMRDA was enacted with the clear purpose of assuring 'the full and active participation by the rank and file in the affairs of the union.' American Federation of Musicians v. Wittstein, 379 U.S. 171, 182-183, 85 S.Ct. 300, 307, 13 L.Ed.2d 214 (1964). The Congress by passing a 'Bill of Rights' for union members determined that the efficiency of a monolithic union under autocratic rule was gained at too great a price if it necessitated any sacrifice in the members' rights to determine the course of their organization. The balance was struck in favor of union democracy. Only a union responsive to the rights of all its members can achieve the ideals of responsibility, opportunity and self-determination that are recognized as fundamental values in the labor movement."

In *Schuchardt* v. *Millwrights & Mach. Erectors Loc. U. No. 2834*, 380 F.2d 795, 797 (10 Cir. 1967), the court said: "The basic purpose of the 'bill of rights' * * * is to assure

to union members a basically democratic union organization with concomitant protections against arbitrary and despotic control by union leaders." As Professor Cox put it: "An individual worker gains no human rights by substituting an autocratic union officialdom for the tyranny of the boss. Only a democratic union, sensitive to the rights of minorities, can help men to achieve the ideals of individual responsibility, equality of opportunity, and self-determination.[5]

On the other hand, the provisions of the LMRDA were not intended to constitute an open invitation to the courts to intervene in the internal affairs of a union. See *Gurton v. Arons*, 339 F.2d 371, 375 (2 Cir. 1964).

Former Representative, now Senator Griffin recently wrote: "Congress sought to strike a balance between rights for individual members and the recognized institutional requirements necessary for a union to be an effective bargaining force."[6]

This court recognizes the need to exercise what Judge Wisdom referred to as a "sound reluctance • • • to interfere in internal union affairs". *Allen v. International Alliance of Theatrical, etc.*, 338 F.2d 309, 317 (5 Cir. 1964). However, the court also recognizes its duty to protect the fundamental rights of individual members against "arbitrary and despotic control by union leaders". *Schuchardt v. Millwrights & Mach. Erectors Loc. U. No. 2834*, supra.

Plaintiffs complain because defendant officers emphasized popular features of the proposed constitution while ignoring or playing down other features which would have

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[5] Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 610 (1959).

[6] Griffin, The Landrum-Griffin Act: Twelve Years of Experience in Protecting Emplyee Rights, 5 Ga. Law Rev. 622 (1971).

been unpopular with many of the members.[7] The duly elected officers of a union have a right and a responsibility to lead, and to give the members the benefit of their advice on questions that arise. They have a right to use the union publications to express their views, and are not ordinarily required to give space therein to the expression of contrary views, provided they do not interfere improperly with whatever rights members may have to communicate their views to other members.

The new constitution contains a provision that:

> "h) Every member shall have the right to:
>
> "1) Circulate petitions on union policy.
>
> "2) Publish and distribute leaflets, newspapers and all other written material or present his opinions through other media.
>
> • • •

The old constitution contained no similar provision, but that does not end the matter.

The old constitution provided for a referendum in which all members in good standing were eligible to vote. The International officers had a duty under the LMRDA to conduct a fair referendum and that obligation should be enforced by the courts. No special expertise in union affairs is required; for more than a hundred years courts have been dealing with similar rights of members of unincorporated associations. See Chaffee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1930); Developments in the Law; Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 985 (1963).

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[7] Plaintiffs also sent copies of the proposed constitution to all members and copies of the proposed Offshore Division by-laws to all offshore members. The union was composed of persons who were sufficiently well educated to serve as masters, mates and pilots, and who presumbaly could read and understand those documents.

The majority rule concept is at the center of our federal labor policy. Because of that policy the Supreme Court has found it necessary to fashion the duty of fair representation. For the same reason Congress enacted a code of fairness to assure democratic conduct of union affairs. *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

A fair referendum under the facts of this case included the right of members whose views were opposed to defendants' to have an opportunity to present their views to other members of the union. This was particularly true in the case of plaintiffs, who were members of a committee appointed by a large local to present the views of that local to other members of the union.

We do not hold that defendants were required to give plaintiff space in the union newspaper to present their views. Whether plaintiffs were entitled to a list of the membership is a more troublesome question, since there are reasons why a union may not wish to take the risk of its membership list falling into the wrong hands.[8] It is not necessary to decide that question in this case, because plaintiffs made an alternative proposition, namely, to pay the expenses of having their views sent to the other members of the union through a mailing service selected by defendants.

We conclude that the LMRDA, interpreted in the light of established legal principles, required defendants to make the list of members of the union available to a mailing

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[8] The California courts have held that apart from the LMRDA, the members of a union have a right to inspect the union's books and records for a proper purpose, and one California court has indicated that this rule applies to lists of members. See *Mooney* v. *Bartenders Union Local No. 284*, 48 Cal. 2d 841, 313 P.2d 857, 64 A.L.R.2d 1154 (1957); *Hod Carriers Local 89* v. *Young*, 42 L.C. 61,641 (Cal. Super. Ct., San Diego, 1961). Labor's Bill of Rights was not intended to narrow the rights of union members.

service chosen by defendants so that plaintiffs could send a letter to all members expressing their views and the view of their local on the issues involved in the referendum.[9]

The judgment must be reversed. What relief is appropriate, however, cannot be decided by this court on the present record. The case will, therefore, be remanded to the district court to fashion such relief as may be most fair and equitable under all the circumstances.

Reversed and Remanded.

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[9] Neither *Calhoon* v. *Harvey*, 397 U.S. 134 (1964), nor *Robins* v. *Rarback*, 325 F.2d 925 (2 Cir. 1963), cert. denied, 379 U.S. 974 (1965), is directly applicable to this case, since they involved union elections rather than referendums. Title IV of the LMRDA provides detailed procedural safeguards for union elections, and the *Calhoon* Court held that the exclusive remedy for protecting those election rights was through a post-election suit by the Secretary of Labor. Of course, those cases and *Gurton* v. *Arons*, 339 F.2d 371 (2 Cir. 1964), a referendum case, strongly suggest that courts should be reluctant to interfere with internal union affairs absent specific statutory license. In this case, however, the defendant union officials' stiff-necked refusal even to provide their opponents access to the membership mailing list rendered the referendum procedure so patently unfair that their conduct can fairly be deemed "a denial of the [members'] equal right to vote in elections or referendums," *Gurton* v. *Arons*, *supra*, 339 F.2d at 374.

Amended Opinion

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of June, one thousand nine hundred and seventy-four.

Present:

HON. HENRY J. FRIENDLY, *U.S.C.J.*
HON. WILLIAM H. TIMBERS, *U.S.C.J.*
HON. ROSZEL C. THOMSEN, *U.S.D.J.*

No. 73-1744

—o—

LLOYD SHELDON et al.

against

THOMAS F. O'CALLAGHAN et al.

—o—

Upon consideration by the panel:

The opinion in the above entitled case, now in slip sheet form, is amended as follows:

At slip op. p. 3764-65, the last two paragraphs of the opinion are deleted, and the following is added:

We conclude that, on the evidence as it stood at the time defendants' motion to dismiss was granted, the LMRDA, interpreted in the light of established legal principles, required defendants to make the list of members of the union available to a mailing service chosen by defendants so that plaintiffs could send a letter to all members expressing their views and the view of their local on the issues involved in the referendum.

Second Amended Opinion

Defendants state, however, that if their motion to dismiss had not been granted, they would have presented evidence that a newspaper published by plaintiffs' local union was widely distributed among the union membership, and that plaintiffs' views were in fact being disseminated.

The judgment must be reversed, and the case remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

HENRY C. FRIENDLY
WM. H. TIMBERS
ROSZEL C. THOMSEN

Second Amended Opinion

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

A. DANIEL FUSARO
Clerk

August 29, 1974

Sheldon v. O'Callaghan

73-1744 Decided May 28, 1974

In Judge Thomsen's opinion in the above-entitled case the following change has been made:

Page 3756, line 6—delete "The convention on January 26, 1970" and insert "The convention reconvened on January 26, 1970" in place thereof.

A. DANIEL FUSARO,
Clerk.

ADF/hd

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

—o—

LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD, ARTHUR SOHNEN and JOHN HAYES, each of them individually and on behalf of all other members of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, similarly situated,

Plaintiffs,

against

THOMAS F. O'CALLAGHAN, as President, or CHARLES M. CROOKS, as Secretary-Treasurer, or WILLIAM M. CALDWELL, as Vice President of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendants.

—o—

The issues in the above entitled action having been brought on regularly for trial before the Honorable Whitman Knapp, United States District Judge, on January 8 and 9, 1973, and at the conclusion of the evidence, the defendants having moved the Court to dismiss the complaint on the merits, and the Court having granted the said motion and the Court thereafter on January 19, 1973, having handed down its findings of fact and conclusions of law, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, directing that judgment shall be entered dismissing the action on the merits, and that the defendants recover their costs, it is

ORDERED, ADJUDGED AND DECREED: That the defendants, Thomas F. O'Callaghan, as President or Charles M.

Crooks, as Secretary-Treasurer or William M. Caldwell, as Vice President of International Organization Of Masters, Mates and Pilots, AFL-CIO, have judgment against the plaintiffs, Lloyd Sheldon, Victor Soto, James Clifford, Arthur Sohnen and John Hayes, each of them individually and on behalf of all other members of International Organization of Masters, Mates and Pilots, AFL-CIO, similarly situated, dismissing the complaint on the merits, with costs to be taxed.

Dated: New York, N. Y.
January 22, 1973

s/ JOHN LIVINGSTON
Clerk

Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
70 Civ. 1279
W. K.

—o—

LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD, ARTHUR SOHNEN and JOHN HAYES, each of them individually and on behalf of all other members of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, similarly situated,

Plaintiffs,

against

THOMAS F. O'CALLAGHAN, as President, or CHARLES M. CROOKS, as Secretary-Treasurer, or WILLIAM M. CALDWELL, as Vice President of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendants,

—o—

Findings of Fact and Conclusions of Law

The above-entitled cause was tried on January 8 and 9, 1973, before the Court sitting without a jury. Following presentation of the plaintiff's case and on motion of the defendants, the action is hereby dismissed on the merits; and the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. The Constitution of the defendant Union in effect in 1969 and early 1970 required that Constitutional amendments be approved by a majority vote of the delegates to a Convention and thereafter by majority vote of the membership in a mail referendum.

2. The new Constitution under challenge in this action was approved by a majority vote of the delegates to the Union's Constitutional Convention held in New Orleans, Louisiana in early 1970.

3. Thereafter, the defendant Union sent to all members a referendum ballot on approval or disapproval of the new Constitution, together with a copy of the entire new Constitution. Offshore members of the defendant Union were also sent a copy of the proposed Offshore Division By-Laws. The ballot sent to Offshore members contained a proposition on approval or disapproval of the proposed Offshore Division By-Laws in addition to the proposition on approval or disapproval of the International Constitution. The official Union newspaper sent to all members also printed the full texts of both documents.

4. All members of the Union were given the equal right to vote on the new Constitution and all Offshore mem-

bers were given the equal right to vote on the Offshore Division By-Laws.

5. The new Constitution substantially restructured the defendant Union by eliminating port Local Unions, establishing a single Offshore Division for all Offshore members, and conferring additional powers and responsibilities, formerly reposed in the various Locals, upon the International and its officials.

6. The new Constitution for the first time imposed a limitation upon the number of members to be admitted into the Union as related to the number of available jobs. This limitation was itself related to the consolidation and restructuring of the Union and the reasons therefor.

7. The old Constitution prescribed mimimum dues to be charged by all Locals to their members. The new Constitution, as part of the restructuring and consolidation, prescribed fixed, identical dues for all offshore members. For most offshore members this meant an increase in dues, although in varying amounts.

8. The Union, and particularly the Convention delegates responsible for drafting the new Constitution to be submitted to the membership, could reasonably have concluded that the dues increase for offshore members was related to the restructuring and consolidation of the Union provided for in the new Constitution, including the limitation on new members.

9. It was reasonably inferrable from a letter dated February 23, 1970 to all members prior to the referendum, which was published in the official union newspaper, that the new Constitution would mean a dues increase for offshore members.

10. The Union refused access to the union newspaper and mailing lists to plaintiffs to express plaintiffs' opposition to the new Constitution. The Union Constitution does not require that such access be given and Plaintiff did not establish that it was the custom, practice or tradition in this Union that such access be accorded. Plaintiff did not establish that the Union newspaper has ever contained letters expressing opposition views on referenda or other subjects of interest to the membership.

11. The actual balloting was conducted by Lybrand, Ross Bros. and Montgomery, a reputable independent firm, which was elected as the balloting agency by the International Convention. This firm was advised, both before and during the actual count of ballots, by an attorney from the law firm of Hughes, Hubbard & Reed.

12. The Lybrand firm mailed out all ballots to the Union members, and the return envelopes were addressed and returned to the Lybrand firm which kept them, unopened, until the ballot count. As a balloting control, the Lybrand firm affixed to all the return envelopes postage from the Lybrand postage meter bearing its unique meter number. On the count, return envelopes not bearing the Lybrand postage meter number in the form affixed by the Lybrand mail-o-mat were rejected.

13. All aspects of the opening, counting and tallying of ballots were handled by Lybrand personnel. Observers were present throughout, including the plaintiff Sheldon, an avowed opponent of the new Constitution.

14. A majority of the votes cast in the referendum approved the adoption of the new Constitution and a majority of the votes cast by offshore members approved the adoption of the Offshore Division By-Laws.

15. There was no evidence presented for any fraud or impropriety or "flooding" in connection with the procedural conduct of the referendum or the procedures utilized in connection therewith.

Conclusion of Law

1. Any finding of fact hereinabove made which also constitutes a conclusion of law is adopted as a conclusion of law. Any conclusion of law herein made which also constitutes a finding of fact is hereby adopted as a finding of fact.

2. The Court has jurisdiction over plaintiffs' claims alleged under Sec. 101 of the Labor-Management Reporting and Disclosure Act of 1959, 28 U.S.C. § 401, and pendent jurisdiction over the other claims alleged which are nonfederal in derivation.

3. In view of the substantial restructuring and consolidation of the Union embodied in the new Constitution, and the interrelationship which the Union could reasonably find to exist between the various changes made, it was not unreasonable to present the entire Constitution as a single package to be approved or disapproved by the Convention and thereafter the membership.

4. In view of the fact that the minimum dues were set forth in the old Constitution and in view of the relationship between the proposed dues increase and other changes made in the new Constitution, it was not unreasonable to embody the new Offshore dues in the New Constitution and not to have a separate vote on the issue of a dues increase. This procedure did not coerce the membership or deprive them of the opportunity to vote upon the dues increase.

Findings of Fact and Conclusions of Law

5. Section 101 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 does not require that all Constitutional amendments to a union Constitution be submitted to a vote seriatim.

6. Nor does that statute require that a proposed increase in dues—a subject dealt with in the Union Constitution—be voted upon separately from the remainder of the Constitution, particularly when the Union may reasonably conclude it to be interrelated with other proposed amendments.

7. Section 101 of the Labor-Management Reporting and Disclosure Act does not require that a Union publish in its official organ views opposed to those expressed therein on referenda upon proposed Constitutional amendments. Nor does it require that Union mailing lists be made available for this purpose.

8. Plaintiff did not establish that the referendum ballot, including the furnishing of a copy of the entire Constitution to be voted upon, unfairly or inadequately presented the question to the membership, or that the Union committed fraud or misrepresentation in its literature on this referendum.

9. Plaintiff did not establish that the balloting procedures and controls were inadequate and plaintiffs have not shown that the actual conduct of the referendum was tainted by fraud or corruption.

10. The old Constitution of the defendant Union did not require that Constitutional amendments be voted upon seriatim.

11. The way in which the new Constitution and Offshore Division By-Laws were prepared and promulgated,

and all the steps leading up to and surrounding their submission to the membership for ratification, as well as the balloting and ratification procedures themselves, were consonant with the provisions of the Union's Constitution and were not violative of any public policy or state or common law requirements. Nor were they violative of Section 101(a) of the LMRDA.

12. Plaintiffs have failed to prove their case, and judgment shall be entered dismissing the action on the merits, and that the defendants recover their costs.

WHITNEY KNAPP
U.S.D.J.

January 17, 1973

Opinion and Decision of Knapp, D.J.

—o—

LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD, ARTHUR SOHNEN and JOHN HAYES, each of them individually and on behalf of all other members of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, similarly situated,

Plaintiffs,

against

THOMAS F. O'CALLAGHAN, as President, or CHARLES M. CROOKS, as Secretary-Treasurer, or WILLIAM M. CALDWELL, as Vice President of INTERNATIONAL ORGANIZION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendants.

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The Court: I am constrained to grant the motion to dismiss. As I view your arguments, they are three fold or

four fold. In the first place, Mr. Hall. you are completely correct on the pendency jurisdiction point. I didn't even have to look that up.

But without going into the technical details of the statute, your contentions as I see them are, first, that by submitting a single package the delegates didn't have a realistic opportunity to vote on any part of the package. Now, as I see my function, it is not to decide whether I would have submitted a single package or a variety of packages or what I would have done. It is whether what was done can be reasonably construed to be a rational way of going about things.

It seems to me that you certainly haven't borne the burden of proof of proving that wasn't so. You made arguments that it could have been done in a different way, but a persuasive argument would have been this seemed the way that the union legitimately wanted to do it and that seems to be the end of my inquiry.

On the issue of the joinder of the dues to the rest of the merger your case seems—of course we have to start off with Judge MacMahon's opinion that in itself is not enough to create a violation and I think the case you rely on where the dues question was joined with a salary raise, in effect, establishes the same thing as Judge MacMahon's opinion because if the court that wrote that opinion was of the view that Congress had intended to have dues questions submitted separately, it wouldn't have to go to the lengths it did to establish that particular procedure in a particular case was unfair.

Here again you could very well argue, as you have, that it would be preferable to work out some scheme for doing it separately, but the only thing it seems to me to be before me is, is it permissible? Can the union justifiably come to the conclusion it was a proper way of doing it and it seems to me that at least you haven't borne the burden of showing it wasn't.

Then the question of whether the equity right, the right to vote includes the right to have your views expressed by the union's publicity organs, there again the question isn't whether if for some other reason I had jurisdiction over this election and I were laying down rules by which this election would be conducted, whether I would make such a requirement. The issue is, baring any other basis for my jurisdiction, the statutes as I read them gives me the right to say that there has to be such a requirement and under the authorities I do not believe it does.

There again, it seems to me if Congress had wanted to create such a right in the courts, it could easily have said so. It has said so on a wide variety of situations. Immediately here in this are statutes and other things that come to mind like the SEC and when Congress wants to impose the obligation of equal opportunity of information, it knows how to do it.

As Judge Lumbard observed in interpreting Justice Black's opinion, the Supreme Court has clearly indicated that Congress didn't intend to get medling into union affairs just because we thought they ought to be done differently than the union hierarchy decided to do them.

Then your contention as to inadequacy of the control procedures adopted by Lybrand, assuming there is some theory on which I could go into that, I don't think you have borne your burden of showing they are inadequate.

You presented through your witness and through your own, I may say, very ingenious and very able arguments, a lot of theories on which they may have been inadequate, but there is no evidence that any of the inadequacies occurred, and when I pinned you down you couldn't even come up with a very strong suspicion.

So what we have is the union membership selected a ballot watchdog and what have you, which is similar in nature to what had been selected in the past. Price, Water-

house had been designated in the past and the American Arbitration Association, and certainly Price, Waterhouse is similar.

The fact that one of the partners of this organization was convicted of an entirely different type of improper conduct, is no suggestion that the convicted partner or anybody working with him had anything to do with this type of operation, let alone this particular one. So it seems to me I am in a position where a thoroughly reputable and presumably competent firm was retained by the vote of the convention and they were advised by a reputable, competent law firm and proposed procedures which seem on their face to be reasonable.

The mere fact that your ingenuity suggests theories on which under some circumstances they might not have worked, assuming I had the authority, would not give me any warrant for upsetting the election on the ground of their alleged inadequacy.

Finally, we come to your state claim, which as I understand it, your view based on the expert testimony of your witness, that this former constitution, in providing that an amendment should be made in a specific way, carries an implication by the words "amendment should be made in a specified way", adds form or substance to the fact that any amendment should be confined to a single subject matter and separate amendments would have to be made with every subject matter. I just rule that the words just aren't susceptible to that interpretation. If the union had wanted to say that there is plenty of language available to convey that idea.

The mere fact that that being the testimony of your expert, may be persuasive but it is not competent and the fact that in fact other amendments have been made in that fashion doesn't change the meaning of the language.

Therefore, I rule that you haven't borne your burden of showing there was any violation of contract right as

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of August, one thousand nine hundred and seventy-four.

Present:

HON. HENRY J. FRIENDLY
HON. WILLIAM H. TIMBERS,
Circuit Judges
HON. ROSZEL C. THOMSEN,
District Judge

Docket No. 73-1744

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LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD, ARTHUR SOHNEN and JOHN HAYES, each of them individually and on behalf of all members of INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, AFL-CIO,

Plaintiff-Appellants,

against

THOMAS F. O'CALLAGHAN, as President, or CHARLES M. CROOKS, as Secretary-Treasurer, or WILLIAM M. CALDWELL, as Vice President, of INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, AFL-CIO,

Defendants-Appellees.

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Order Denying Petition for Rehearing

A petition for a rehearing having been filed herein by counsel for the appellee.

Upon consideration thereof, it is Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

VINCENT A. CARLIN
Chief Deputy Clerk